No. 6484

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JESSIE SMITH, ADMINISTRATRIX OF THE ESTATE OF JAMES W. WHITEHEAD, DECEASED, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

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STATEMENT OF THE CASE

Plaintiff, appellee herein, instituted this action to recover on a contract of War Risk Term Insurance granted one James W. Whitehead by defendant while in its military service.

Plaintiff's amended complaint (R. 1–5) contains two counts.

In her first count, after alleging the enlistment and discharge of the insured and the granting of the contract sued on, plaintiff alleges in Paragraph IV (R. 2) that on the 20th day of November, 1918,

the insured became permanently and totally disabled, by reason whereof there became due and owing to him the sum of $57.50 per month.

In Paragraph V of her complaint (R. 3) plaintiff alleges that the insured died on the 30th day of September, 1921, and that by reason thereof his estate became entitled to receive from the defendant the sum of $57.50 per month from that date.

In her second count (R. 3) plaintiff, after realleging the matters pleaded in Paragraphs I, II, and III of her first cause of action, alleges that the defendant made a compensation rating in favor of the deceased from a date prior to the lapse of his contract sufficient to pay premiums on his contract to and including July 27, 1921, the date of his recognized total and permanent disability. This count contains further allegations intended to state a cause of action under the provisions of Section 305 of the World War Veterans' Act, 1924, as amended. However, since the court did not find for plaintiff on this count, it is unnecessary to go into the details thereof.

In its answer to the first count of plaintiff's complaint (R. 5–7), defendant, after admitting the enlistment and discharge of insured and the granting of the contract sued on, denies that insured became permanently and totally disabled as alleged and denies that the plaintiff is entitled to receive from it the sum alleged.

In answer to the second count of plaintiff's complaint (R. 7–8) defendant denies each and every allegation thereof.

Defendant filed its petition to join Lilly Gladys Whitehead as a defendant in this action (R. 9–11), and an order granting the petition was made (R. 12).

This cause was tried to the court, sitting without a jury (R. 47), a jury having been waived in writing (R. 17).

At the close of plaintiff's evidence (R. 64, 65) defendant moved for a nonsuit as to both counts of plaintiff's complaint, which motion was overruled (R. 65).

At the close of the whole case (R. 71) the defendant moved for judgment, which motion was denied (R. 71).

The codefendant, Lilly Gladys Whitehead, was defaulted and a judgment rendered against her. (R. 18.)

Whereupon the cause was submitted to the court, which found its findings of fact and conclusions of law. (R. 82, 83.)

Whereupon judgment was rendered in favor of plaintiff on the findings of fact and conclusions of law of the court. (R. 30.)

Defendant filed its motion for a new trial (R. 33), which motion was by the court overruled (R. 34).

From the judgment in favor of plaintiff defendant is here with this appeal.

ASSIGNMENTS OF ERROR

I

That the Court erred in overruling defendant's objection to the introduction of Bureau ratings, they being defendant's Exhibit —, on the ground that they were immaterial.

II

That the Court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of plaintiff, they being Exhibit No. —, on the ground that they were not properly identified, and on the further ground that the government had no opportunity to cross-examine the physicians who made the reports.

III

That the Court erred in refusing to admit in evidence the personnel records of the Great Northern Railway and the report of physical examination made for the railroad by Dr. Flynn, they being defendant's Exhibit No. — for identification.

IV

That the Court erred in awarding judgment to the Administratrix of plaintiff's estate of insurance installments accruing subsequent to the veteran's death when there was no evidence offered to show that there was no designated beneficiary of said insurance.

V

That the Court erred in failing and refusing to dismiss the second cause of action of plaintiff's complaint for want of jurisdiction, and on the further ground that the decision of the United States Veterans' Bureau on such a compensation matter is conclusive, final, and not subject to jurisdictional review.

VI

That the Court erred in denying defendant's motion for a nonsuit made at the the close of plaintiff's case and renewed at the close of all of the testimony, for the reason that plaintiff did not prove permanent and total disability of James W. Whitehead during the time his policy was in effect, to which denial of said motions defendant took exceptions, and exceptions allowed.

VII

That the Court erred in entering judgment in favor of plaintiff, as the evidence was insufficient to sustain such judgment.

VIII

That the Court erred in denying defendant's motion for a new trial, to which denial exception was noted by defendant.

IX

That the Court erred in refusing to make and enter Finding of Fact No. III, proposed by defendant, which is as follows:

> That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of War Risk Insurance in the sum of $10,000, designating no authorized person as beneficiary on said policy; that thereafter there was deducted from his monthly pay as premium for said insurance the sum of $6.60 per month, and a policy of insurance was duly issued to him, by the terms whereof the defendant agreed to pay said James W. Whitehead the sum of $57.50 per month in the event he suffered total and permanent disability, or in the event of his death to make 240 such payments to his estate, and that the premiums were paid thereon to November, 1918, only.

To which failure defendant noted an exception.

X

That the Court erred in failing and refusing to make and enter Finding of Fact No. IV proposed by defendant, which is as follows:

> That James W. Whitehead died of paresis, superinduced by constitutional lues (syphilis), on the 30th day of September, 1921.

To which refusal defendant noted exception.

XI

That the Court erred in its failure and refusal to make and enter Finding of Fact No. V proposed by defendant, which is as follows:

> That said James W. Whitehead was at no time after discharge, until July 27, 1921, suffering from a compensable disability within the purview of the laws and regulations affecting the administration of veterans' affairs by the United States Veterans' Bureau.

To which failure defendant duly excepted.

XII

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VI proposed by defendant, which is as follows:

> That said James W. Whitehead became totally and permanently disabled on July 27, 1921.

To which failure defendant noted exception.

XIII

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VII proposed by defendant, which is as follows:

> That the policy of insurance, aforesaid, issued to the said James W. Whitehead, lapsed for nonpayment of premiums November 31, 1918, and was not in force and effect at the time said James W. Whitehead became totally and permanently disabled on

July 27, 1921; that no premiums were paid by said insured, James W. Whitehead, nor by anyone on his behalf, subsequent to November 31, 1918, the date of lapsation of said insurance, or prior to the beginning of permanent and total disability of said insured, July 27, 1921.

To which failure defendant noted exception.

XIV

That the Court erred in its failure and refusal to make and enter Finding of Fact No. VIII, proposed by defendant, which is as follows:

That said James W. Whitehead was not totally and permanently disabled at the time of his discharge on November 20, 1918, but was able-bodied and worked continuously at a substantially gainful occupation, to wit, as a switchman and switch foreman, from November, 1918, until November, 1920, earning during that period the same wages paid to men engaged in like employment, to wit, wages ranging from $5.11 a day to $6.40 a day; he, the said James W. Whitehead, working not less than thirteen days in each month during said twenty-five months, the period of his employment as a switchman and switch foreman; that said James W. Whitehead, during such period of employment, received several certificates of merit from his superiors for efficient work, and his salary was, from time to time, raised by his employers.

To which failure defendant noted exception.

XV

That the Court erred in its failure and refusal to make and enter Finding of Fact No. IX proposed by defendant, which is as follows:

> That said James W. Whitehead was guilty of misconduct while in the service, prohibiting the granting to him by the United States Veterans' Bureau of a compensation disability rating for the purposes of compensation.

To which failure defendant noted exception.

XVI

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. I proposed by defendant, which is as follows:

> That the plaintiff is entitled to recover on either cause of action herein.

To which refusal defendant duly noted its exception.

XVII

That the Court erred in its failure and refusal to make and enter Conclusion of Law No. II proposed by defendant, which is as follows:

> That both of said causes of action herein should be dismissed and the defendant have judgment for its costs and disbursements herein.

To which refusal defendant duly noted its exception.

XVIII

That the Court erred in making and entering plaintiff's Finding of Fact No. IV, which is as follows:

> That during the period of service of the Deceased in the United States Army he became afflicted with paresis by reason of said disease, he was discharged on the 20th day of November, 1918, totally and permanently disabled from following continuously any substantially gainful occupation, and as a result of which disease he died on the 30th day of September, 1921, by reason whereof he became entitled to receive from the Defendant the sum of $57.50 per month, commencing on the said 20th day of November, 1918.

To which Finding defendant duly entered its exception.

XIX

That the Court erred in making and entering plaintiff's Conclusion of Law No. II, which is as follows:

> That the plaintiff is entitled to recover from the Defendant, United States of America, the sum of $57.50 per month, commencing on the 20th day of November, 1918.

To the entry of which defendant duly entered its exception.

XX

That the Court erred in denying defendant's motion to strike the testimony of witness Renche, on the ground that it was too indefinite, to which denial the defendant duly entered its exception.

XXI

That the Trial Court erred in entering judgment in favor of the plaintiff in violation of the provisions of Section 300 of the World War Veterans' Act and United States Code Annotated, Title 38, Section 511, in that Lilly Gladys Whitehead was the only beneficiary designated in the policy of insurance herein sued upon.

PERTINENT STATUTES AND REGULATIONS

Section 5 of the World War Veterans' Act as amended July 3, 1930, Public 522:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. All

officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act, regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, and forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided,* That regulations relating to the nature and extent of the proofs and evidence shall provide that due regard shall be given to lay and other evidence not of a medical nature.

Section 13 of the War Risk Insurance Act (40 Stat. 555):

That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the

provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided, however,* That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: *And provided further,* That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under

the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge or receive any fee or compensation except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

Section 400 of the War Risk Insurance Act (40 Stat. 409):

That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female)

and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States upon application to the bureau and without medical examination shall grant insurance against the death or total permanent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided.

Section 402 of the War Risk Insurance Act (40 Stat. 615):

That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them.

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

I, William C. DeLanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An act to authorize the establishment of a Bureau

of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby on this 15th day of October, 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

"1. Insurance will be issued for any of the following aggregate amounts upon any one life: * * * Which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all, including months of disability already paid for in both cases except as otherwise provided.

"2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates: * * *

"Rates at ages higher or lower will be given on request.

"The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected be-

fore the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at the net rates computed by the bureau according to the American Experience Table of Mortality and interest at 3½ per cent per annum.

"3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

"(T. D. 20 W. R.)

"TOTAL DISABILITY

"Regulation No. 11 relative to the definition of the term 'total disability' and the determination as to when total disability shall be deemed permanent."

TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially

gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments or insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY,
Director.

Approved.
W. G. MCADOO,
Secretary of the Treasury.

ARGUMENT

POINT 1

The court erred in overruling defendant's objection to the introduction of the Bureau's ratings.

In the case of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, l. c. 806, the court said:

> The report discloses that it was made to the compensation division of the Veterans' Bureau; that is, it was made for the pur-

pose of compensation. Disability under a war-risk insurance policy is a different thing than disability under the compensation statutes. Disability under a war-risk insurance policy is such "impairment of the mind or body as renders it impossible for the assured to follow continuously any substantially gainful occupation." War-risk insurance deals with the individual case and with "any" occupation. Disability under the compensation statute, on the other hand, deals with "average impairments," and with inability to follow a pre-war occupation. Title 38 USCA, Sec. 477, defines disability ratings for the purposes of compensation as follows: "The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of an injury."

That part of the report which estimates the disability of Runkle for compensation purposes is, therefore, immaterial, for it is not an estimate of his ability to pursue any gainful occupation, but is an estimate of the "average impairments of earning capacity resulting from such injuries in civil occupations similar to the occupation of the injured man at the time of enlistment."

> Plaintiff also offered a rating made by the Central Office Board of Appeals, on April 12, 1923, after the death of the insured. This was properly excluded; it was not identified, and it states no facts pertinent to the inquiry. In *United States* v. *Golden*, 34 F. (2d) 367, 370, this court said: "This is enough to indicate the immateriality of 'ratings'" for compensation in an insurance case. The doctors making the "ratings" are of course competent witnesses, just as doctors examining for other purposes are; but it is their testimony that is competent, and not the Bureau's "rating" predicated thereon.

We think that the rule announced in the case, supra, is correct and if so, it was prejudicial error to admit the rating in the instant case.

Point II

The court erred in overruling defendant's objection to the introduction of Bureau reports of physical examinations of insured.

There was no testimony that the doctors who made these examinations were authorized to make same; that they were employees of the defendant at the time the examinations were made or otherwise; that the doctors were not available as witnesses or that the doctors whose names appeared as having made the examinations actually made them. Furthermore, these reports are hearsay, in that they report simply what the doctor making them says

he found upon examination of the deceased and represent the conclusion and opinion of the doctor based on facts he says he found. Also these reports contain statements made by the deceased, which are clearly self-serving. In this connection it should be kept in mind that at the time the examinations were purported to have been made the deceased had applied to the defendant for compensation under the provisions of the then War Risk Insurance Act, and that the examinations, if made, for the defendant were for the purpose of determining whether deceased had any disability. Therefore it was to the interest of the deceased that he have a disability, and certainly any statements he made at such a time fall within the class of self-serving statements, the same as any statement a person makes to a doctor who examines him for the purpose of testifying in his behalf, such statements being, the writers of this Brief understand, always excluded from evidence. Again, by admitting these exhibits the defendant was denied its right of cross-examining the witnesses against it.

It is submitted that these reports were not admissible under the rule laid down in the cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, and certainly their admission is in conflict with the rule laid down in the case of *United States* v. *James W. Wilson,* decided June 17, 1931, by the Fourth Circuit Court of Appeals.

In the Cole case, l. c. 341, the court said:

> There was no error in the admission of appellee's Exhibits H and I. These exhibits consisted of two reports of physical examinations of appellee each dated April 30, 1923, and signed by physicians of the Bureau. Only those parts of the reports which gave specific findings of fact were permitted in evidence. The examinations were made under the authority of the Director (Tit. 38, ch. 10, Sec. 426, U. S. C.) and were taken from the Bureau's files pertaining to appellee. It is insisted that these reports are (1) confidential and (2) hearsay. We can not agree. They are not confidential or privileged when required to be produced in any suit or proceeding pending in the United States Court (Tit. 38, ch. 10, Sec. 456, Clause (b), U. S. C., *Gonzalez* v. *U. S.,* 298 Fed. 1003) and in fact no privilege was claimed for them in the lower court. Further, we regard these reports as exceptions to the hearsay rule. They were made by the examining physicians under the sanction of official duty and as and for a permanent record of specific facts to be kept in the files of the Bureau. * * *

It will be noted that in the Cole case only that part of the reports which gave specific findings of fact were permitted in evidence, while in the instant case the entire reports, including the statements of deceased, were admitted.

In the Runkle case, l. c. 806, the court said:

> The plaintiff offered in evidence a statement purporting to be signed by one Doctor Maguire, and purporting to be an examination of the insured made on December 4, 1919. The report discloses an active pulmonary tuberculosis; an inability to perform any part of any occupation; concludes that his chances for recovery or arrest are remote. The report recommends a rating for compensation of "Temporary Total." The report was found in the files of the attorney for the United States Veterans' Bureau for the State of Colorado. To this proffer of proof the defendant objected on the ground that the evidence was incompetent and immaterial, that the document had not been identified; and that it was hearsay.
>
> The identification was not sufficient and the report was properly excluded. Since the case is to go back for another trial, we pass upon the other objections. If the report is properly identified as having been made by a doctor employed by the United States Government, and that it is his report of a physical examination made of the insured, it is not incompetent. * * *
>
> This statute contemplates that those claiming the benefits of the War Risk Insurance Act may have access to such reports. Such access would be of little avail to the claimants if the reports could not be used in court. Moreover, the statute contemplates use in court by subjecting them to the process of

> the United States court. Furthermore, the generous attitude of the government toward the beneficiaries of the Veterans' Act repels any idea of a desire to conceal any material fact from the veterans or their beneficiaries. Particularly is this true of findings of a physical examination. The standing of the doctors employed by the Government is assurance of the integrity of their reports. In *Gonzalez* v. *United States,* 298 F. 1003, the district court required the government to produce for the examination of the plaintiff in a war-risk insurance case, such reports and records. In *Evanston* v. *Gunn,* 99 U. S. 660, the Supreme Court held that the records of meteorological stations were admissible in evidence, such reports being of a public character, and made in pursuance of public duty. To the same effect see *M'Inerney* v. *United States* (1 C. C. A.) 143 F. 729. It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible.

It will be noted that the court in the Runkle case required that reports of the character of plaintiff's Exhibits should be properly identified. Furthermore, in view of the use of the language, "Particularly is this true of findings of a physical examination" and the language "It is our conclusion that as far as material to the issues the report of Doctor Maguire, if properly identified, is admissible," found in the opinion, *supra,* it is to be inferred that the court had in mind that only the physical findings of the doctor were admissible.

In the Wilson case (Not reported) the court said:

> Two main questions are raised by the appellant in its assignments of error; FIRST, that the court erred in admitting certain reports of physical examinations made of the plaintiff, which were contained in the files of the United States Veterans' Bureau; SECOND, that the court erred in not directing a verdict for the defendant.
>
> The reports in question, to the admission of which objection was made, were reports of physicians to the Veterans' Bureau, and contained, among other things, certain statements of plaintiff himself, made during the examination. In *United States of America* v. *Wescoat,* decided by this court, April 13, 1931, Judge Parker exhaustively discusses the question of the admission of evidence of this character, and this court held that the evidence in that case was admissible, because it constituted the "best evidence possibly obtainable," but, in the *Wescoat case* there was no question of the admission of anything other than the certificate of the physicians, and the field hospital tags were entries made by the field hospital physicians in the ordinary course of professional duty. The physicians themselves were not available as witnesses, and the tags constituted the best evidence as to the findings of the physicians. In this case there is no showing that the physicians making the reports could not have been obtained as witnesses, and the judge admitted the entire report, including what may well be termed self-serving decla-

rations, made by plaintiff at the time of the various examinations.

The cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, relied upon by attorneys for the plaintiff, are easily distinguished from the instant case, and assuming without deciding that the reports in those cases were properly admitted these decisions are not controlling here. The admission of the records as they were here admitted is, in our opinion, reversible error.

Point III

The court erred in awarding judgment for installments accruing subsequent to insured's death.

The court will take judicial notice that the contract herein sued on is a creature of statute and of the statutes controlling same.

Section 303 of the World War Veterans' Act, 43 Stat. 1310, provides, in part:

> If no person within the permitted class be designated as beneficiary for yearly renewable term insurance by the insured either in his lifetime or by his last will and testament or if the designated beneficiary does not survive the insured or survives the insured and dies prior to receiving all of the two hundred and forty installments or all such as are payable and applicable, there shall be paid to the estate of the insured the present value of the monthly installments thereafter payable, said value to be computed as of date of

> last payment made under any existing award. * * *

Under the terms of the statute just quoted, plaintiff was not entitled to recover all the installments provided for under the contract sued on as found in the judgment appealed from, unless no person within the permitted class was designated as beneficiary under the contract, or if a beneficiary was designated he did not survive the insured, or survived the insured and died prior to receiving all of the installments. Plaintiff adduced no proof that no person within the permitted class was designated as beneficiary of the contract sued on, or that such person was designated and did not survive the insured, or survived him, but died prior to receiving all the installments due under the contract. Therefore, the court erred in rendering judgment for plaintiff for all the installments accruing subsequent to the death of insured.

Point IV

The court erred in denying defendant's motion for nonsuit.

Treasury Decision Number 20, page 17 of this brief, which is a regulation promulgated under sanction of law, and of which courts will take judicial notice, defines a permanent and total disability within the meaning of the contract herein sued on to be "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation

* * * whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." The courts have in the main approved this definition. Hence for plaintiff to be entitled to recover she must produce some substantial proof that the insured, James W. Whitehead, within the time alleged in her complaint, namely, November 20, 1918, or within thirty-one days after December 1, 1918, had an impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation, and that such impairment of mind or body was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

Carl A. Whitehead for plaintiff testified (R. 51–53) that the insured worked for the Great Northern Railroad from the Fall of 1918 until the Fall of 1920.

H. W. Donahue for plaintiff testified (R. 54–56) that insured worked for the Great Northern Railroad in 1918, 1919, and 1920. This witness further testified that insured was a member of his crew and sometimes acted as foreman of the crew and while so acting performed the same duties as witness did when foreman. This witness also testified that credits were given insured on July 1, 1920, and January 1, 1921. That witness did not receive any credits.

W. H. Horton for plaintiff testified (R. 56–58) that after insured was discharged he came back to

the Great Northern Railroad and worked as a switchman.

Dennis O'Hearn for defendant testified (R. 65–67) that he was Chief Clerk in the Superintendent's office of the Great Northern and that defendant's exhibit A is the original pay roll for insured. This witness further testified that insured was paid in—

> November, 1918, 48 hours, 64¢ an hour, $30.70. In December, 1918, 240 hours, for which he was paid $153.80. In January, 1919, he was paid $148.50, working 232 hours. In February, 1919, he was paid $102.40, working 160 hours.
>
> A 31-day month has 248 hours—eight hours a day. February was a 28-day month.
>
> During March, 1919, he earned $128.15, working 215 hours. During April, 1919, he was paid $138.60, working 246 hours. During May, 1919, he was paid $133.15, working 208 hours. In June, 1919, he was paid $112.60, working 176 hours. During July, 1919, he was paid $143.35, working 208 hours. He was paid the same rate as other men in the same capacity. During the month of August, 1919, he was paid $97.30, working 152 hours. During September, 1919, he was paid $133.90, working 26 days, or 208 hours, and 30 minutes overtime. During October, 1919, he was paid $161.15, working 30 days, and one-half hour overtime. That was a full month. During November, he was paid $157.55, working 30 days, and one hour overtime. He was employed during November

for thirteen days as night foreman. During December, 1919, he was paid $150.65, working 28 days and several items of overtime, aggregating 225 minutes overtime. During January, 1920, he was paid $145.20, working 28 days. During the month of February, 1920, he was paid $117.50, working 23 days. During the first half of March, 1920, he worked ten days as a switchman, four days as a foreman, and earned $72.75. The rest of the month of March is not in the records for some reason or other. He was paid $84.10 for the rest of March, or 16 days, and 2½ hours overtime. During the last half of March he worked one night as foreman. During April, 1920, he earned $151.15, working 29 days. He was employed 9 days of that time as foreman. During May, 1920, he was paid $119.10, working 23 days and 110 minutes overtime. During June, 1920, he was paid $133.85, a total of 26 days, and one hour overtime. The second half of July does not seem to be in here—only the first half of July. He worked 10 days and earned $51.35 during the first half of July. I can not tell whether he was on vacation the last half of July. In August, 1920, he was paid $188.55, working 29 days, with 30 minutes overtime. His salary was increased during August, 1920, the increase applying to everybody. He was paid $149 in September, 1920, working 23 days. During October, 1920, he was paid $156.85, working 24 days, and 65 minutes overtime. During the month of

> November, 1920, he was paid $114.10, working 16 days and 20 minutes. I have no record showing that he worked after November, 1920.

While, as stated, the witnesses, Whitehead, Donahue, and Horton, testified that insured worked for the Great Northern Railroad, they also testified in detail that he did not work regularly and that they noticed he was not as efficient as before the War and related different things that they had observed insured doing and about him. However, the fact remains that from their testimony it is gathered that insured worked with reasonable continuity from the Fall, 1918, until the Fall, 1920.

We gather from an unchallenged objection, made by defendant's counsel, to the hypothetical question propounded Doctor Tracy, a witness for plaintiff (R. 62), that the insured was treated for gonorrhea and syphilis while in the military service. Furthermore, it appears from the testimony of this witness that the insured was suffering from paresis caused by syphilis. Hence, it seems that we have in this case a suit on a war risk insurance contract where it will hardly be contended that the disability claimed was due to the insured's war service. Therefore, there is no call for the application of the rule intimated in some decisions in suits of this character that such contracts should be liberally construed in favor of the insured.

Referring to the insured, the learned trial court in its decision (R. 72, 73) said, in part:

> That he was employed by the Great Northern Railway Company as switchman from November, 1918, until November, 1920, for a very large portion of the time, covering a period of twenty-five months. During that time he worked some three or four months—possibly four, or five whole months, and the other months he worked a greater part of the month; he received the same wages that were paid to other employees in like work.

Yet, notwithstanding this finding, the trial court found that insured was permanently and totally disabled during that period.

In view of the holding of the learned trial court, that the insured was permanently and totally disabled at the time he was discharged from the military service, and, as stated by the trial court in its decision (R. 75) there was no necessity for passing upon the second cause of action. However, we find the trial court saying:

> If this condition (referring to the paresis or syphilis) parentheses ours—was in his system at his enlistment, and if the Government position is true—but the presumption is that he was free from anything of this sort, and there is no evidence that he was, except some statement that says that there was some scab on the end of his penis, but being accepted, the Government is bound. He is presumed to be—to have been all right. There is no evidence that he did anything to bring about

> any condition of syphilis; and if it was in his system there was something to aggravate it—whether it was aggravated, the Court was unable to say, nor is it necessary; and as to his misconduct in service and in the absence of proof, the presumption would be that his conduct was good—the presumption would be in his favor.

In rendering the last above quoted part of its decision, the learned trial court evidently had in mind the provisions of Section 200 of the World War Veterans' Act, as amended July 2, 1926, 44 Stat. 793, with reference to the presumption of sound condition of persons entering the military service of the United States. However, the learned trial court overlooked the fact that Section 200, supra, was amended by an Act approved July 3, 1930, 46 Stat. 995, expressly providing that the presumption of sound condition and the presumption of the service connection of certain disabilities therein named had no application in suits on war-risk insurance contracts.

In the case of *Owen D. Nicolay* v. *United States,* decided by the Tenth Circuit Court of Appeals on June 30, 1931, the court quoted with approval from *Woolworth Company* v. *Davis* (C. C. A. 10), 41 Fed. (2d) 342, 347, as follows:

> "When the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it." *American Car & Foundry Co.* v. *Kindermann* (C. C. A. 8), 216 F.

499, 502; *Missouri, K. & T. Ry. Co.* v. *Collier* (C. C. A. 8), 157 F. 347, cert. denied, 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920. Cases from many jurisdictions are gathered in a note in 8 A. L. R. 798, supporting the proposition that uncontradicted evidence which is contrary to physical facts should be disregarded. Judgments can not and should not stand if they are entered upon testimony that can not be true.

The evidence in the case at bar discloses the physical fact that insured worked with reasonable continuity for substantially gainful wages for a period of, as stated by the trial court in its decision, twenty-five months. Therefore, under the ruling in the Nicolay case, supra, the testimony of the witnesses, that insured was not able to do this work, should not be held to be "substantial evidence" sufficient to support the finding for plaintiff.

Point V

The court erred in its refusal to make Finding of Fact No. VII, proposed by the defendant.

It is not disputed that the contract sued on lapsed for nonpayment of premiums on November 31, 1918, unless the insured became permanently and totally disabled on or before that date. For the reasons assigned in support of Point IV of the argument herein insured did not become permanently and totally disabled on or before that date. Therefore the court erred in not finding as re-

quested by defendant in its requested Finding No. VII.

Point VI

The court erred in its refusal to make Finding of Fact No. VIII, proposed by defendant.

For the reasons assigned in support of Point IV of the argument herein the court erred in not finding as requested by defendant in its requested Finding of Fact No. VIII.

Point VII

The court erred in entering judgment in favor of plaintiff and in denying defendant's motion for a new trial.

Since, as shown in the argument in support of Point IV of this Brief, the court should have sustained defendant's request for a nonsuit and motion for judgment in its behalf, it was error for the court to render judgment for plaintiff and deny defendant's motion for a new trial.

Point VIII

The court erred in making and entering plaintiff's Conclusion of Law No. II.

Since, as shown in the argument in support of Point III, plaintiff was not entitled to recover all the installments accruing subsequent to the death of the insured, unless the proof showed that no beneficiary was designated under the contract, or if designated had predeceased insured, or survived him and died before receiving all the installments

and further, since, as shown in the argument in support of Point IV, the proof herein failed to show that insured became permanently and totally disabled during the life of the contract sued on, thereby maturing same, the plaintiff was not entitled to recover herein, and it was error in the court to conclude that as a matter of law she was entitled to recover.

Point IX

The court erred in its refusal to make Conclusion of Law No. II, as proposed by the defendant, that both of plaintiff's causes of action be dismissed and the defendant have judgment.

For the reasons assigned in support of Point IV of the argument herein, the defendant was entitled to judgment and therefore the court erred in not dismissing plaintiff's causes of action and rendering judgment for defendant.

For the foregoing reasons it is respectfully submitted that the judgment be reversed.

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